before me were just speculative issues raised by counsel for the defendant company without any foundation whatsoever. Further, I did not see what difference it made that the guarantees and memoranda were executed in Hong Kong. No evidence was placed before me that the governing law in Hong Kong was different from Singapore.

The defendant company must comply with its own articles of association. It must act fairly in a situation like this. Included in the defendants' bundle of authorities was the case *Re Diamond Rock Boring Co Ltd, ex p AR Shaw.*[6] In reliance on this case, counsel for the defendant company urged this court not to exercise its summary jurisdiction under s 194(1) in ordering rectification of the register. I did not see how this case could assist the defendant company. On the contrary it reinforced my view that I should grant the orders prayed for. Putting it very briefly, in *Ex parte Shaw*,[6] one Shaw, through an agent Smith, purchased shares belonging to one Piers. Smith acted as agent for both parties. Shaw paid the purchase price to Smith. In the meantime, Piers executed a transfer and forwarded it together with the scrip to the secretary of the company. The secretary wrote upon the transfer the words 'certificates lodged at company's office' and returned it to Piers. The scrip was retained by the company. Piers forwarded the transfer to Shaw through Smith. Shaw executed the transfer and returned it to Smith so that Smith could get Shaw's name put upon the list of shareholders. Smith absconded and did not pay over the sale price to Piers and neither did he forward the transfer to the company for registration. Shaw demanded that the company put his name on the register which the company refused. On Shaw's application to court to rectify the register, Piers opposed the application. The company appeared but offered no opposition. The application of Shaw was granted. Lord Coleridge CJ sitting in the Court of Appeal said at p 479:

> I think that the legislation intended to give the court jurisdiction to make an order so as to decide questions of title, trusting to the discretion of the court not to decide in this summary manner any intricate or difficult question of title; but that, if the court thinks fit, they have jurisdiction to make the order in all cases.

Brett LJ also stated the following at p 484:

> No doubt, as a matter of judicial discretion, when there is a real dispute, and the amount depending is large, or if the facts are complicated, or any general principle is involved, the court, instead of proceeding in this summary manner at once, should direct an issue or some other proceeding.

In the instant case, no dispute of title was raised by either Lie Mo Meng or Lie Mo Kwang. Fictitious issues were unnecessarily raised by the defendant company. In my view there was clearly no merit in the second point of the defendant company.

Accordingly, I granted the orders prayed for by the plaintiffs, with the modification that the new share certificates be delivered within 14 days thereof. I awarded costs to the plaintiffs.

Application allowed.

Solicitors: *Shook Lin & Bok; Jing Quee Chin Joo & Teck Hui.*

Reported by *Ng Sheau Jiuan*

Public Prosecutor v Kadir bin Awang

HIGH COURT (SINGAPORE) – CRIMINAL CASE NO 2 OF 1988
SINNATHURAY J AND GRIMBERG JC
3 FEBRUARY 1989

Criminal Law – Dangerous drugs – Importation of – Alibi defence – Objection to admissibility of accused's oral and written statements – Failure of prosecution to call person who recovered package of drugs as witness – Merits of case – Whether elements of offence established – Misuse of Drugs Act (Cap 185, 1985 Ed), s 7

Criminal Procedure – Voire dire – Failure of prosecution to call witnesses in voire dire to rebut accused's allegations – Whether fatal to admission of statement

The accused was charged with having imported 33 packets containing not less than 50.61 gm of diamorphine into Singapore without authorization, an offence under s 7 of the Misuse of Drugs Act (Cap 185, 1985 Ed). It was the prosecution's case that the accused had gone to Malaysia with J, that the drugs had been purchased by the accused in Penang, that the accused and J had returned to Singapore by train from Johore Bahru, that as the train reached a stretch of the railway line at Lower Delta Road in Singapore, the accused had thrown a package containing the drugs out of the train window. The package was retrieved by Y who then took the package to a flat where he was joined later by the accused and J. Narcotics officers subsequently raided the flat and found the 33 packets of diamorphine in a cupboard. J was produced in court but the charge against her was withdrawn and she was discharged, her discharge amounting to an acquittal. At the trial of the accused, she gave evidence on behalf of the prosecution. The case for the defence was that he had not gone to Penang with J and that he had been working as a stevedore on board a Japanese vessel during the period in question. The defence also objected to the admissibility of an oral statement made to the narcotics officer and a written statement made pursuant to s 122(6) of the Criminal Procedure Code (Cap 68, 1985 Ed) contending, inter alia, that they were not made voluntarily and that the written statement was not recorded in compliance with s 122(6). Counsel for the defence also contended that failure of the prosecution to call Y as a witness left a serious gap in the prosecution's case and that an adverse inference should be drawn from this.

Held, convicting the accused:

(1) The failure to call the narcotics officers as witnesses in the voire dire to rebut the accused's allegations was an impru-

dent decision on the part of the learned DPP. Such an omission imposes upon the court a duty to scrutinize the evidence as to voluntariness with very special care.

(2) The prosecution had proved beyond reasonable doubt that the requirements of s 122(6) was complied with. The court is satisfied that both the charge and the warning were interpreted and explained to the accused.

(3) The accused's objections to the admissibility of the oral and written statements failed. The accused had made both the oral and written statements and he had made them voluntarily.

(4) In the present case, the essential elements of the offence were capable of being, and were, established without the need to call Y. Y's evidence was not crucial and the decision not to call him, and to offer him to the defence did not amount to a failure on the part of the prosecution to discharge the onus of proof which lay upon it.

(5) The court disbelieved the accused's alibi. It was unsupported by any independent evidence and the accused was wholly unconvincing in his account of it.

[*Editorial Note*: The accused has appealed to the Court of Criminal Appeal vide Criminal Appeal No 3 of 1989.]

Cases referred to

1 *Tan Too Kia* v *PP* [1980] 2 MLJ 187 (refd)
2 *PP* v *Ibrahim bin Mastari* [1980] 2 MLJ 188 (refd)
3 *Haw Tua Tau* v *PP* [1981] 2 MLJ 49 (refd)
4 *Abdullah Zawawi* v *PP* [1985] 2 MLJ 16 (distd)

Legislation referred to

Criminal Procedure Code (Cap 68, 1985 Ed) s 122(6)
Misuse of Drugs Act (Cap 185, 1985 Ed) s 7

Lee Sing Lit (Deputy Public Prosecutor) for the Public Prosecutor.

Raj Kumar for the accused.

Cur Adv Vult

Grimberg JC (delivering the grounds of decision): Kadir bin Awang ('the accused') was charged with having imported into Singapore, at about 5.45 am on or about 9 October 1986, in a train alongside the Ayer Rajah Expressway, 33 packets of a substance containing not less than 50.61 gm of diamorphine, without authorization, an offence under s 7 of the Misuse of Drugs Act (Cap 185, 1985 Ed).

It was the prosecution's case that the accused had gone to Malaysia with Jamala bte Hashim ('Jamala') on 1 October 1986, that the drugs had been purchased by the accused in Penang and that the accused and Jamala had returned to Singapore by train from Johore Bahru early on the morning of 9 October. As the train reached a stretch of the railway line at Lower Delta Road, adjacent to the Ayer Rajah Expressway, the accused had thrown a package containing the drugs out of the train window. The package was retrieved by Yusoff bin Mohd Noor ('Yusoff'), who had been waiting on or near an overhead bridge. Yusoff took the package to a flat known as Blk 14, #02-288, Telok Blangah Crescent ('the flat'), where he was joined later by the accused and Jamala.

The prosecution led evidence that on the afternoon of 9 October 1986, senior narcotics officer Jamaludin bin Salleh ('SNO Jamaludin') and four officers attached to the enforcement divison, Central Narcotics Bureau ('CNB') set out to raid the flat. At about 5.30 pm, SNO Jamaludin and three of his men knocked on the door of the flat; a fourth officer, ANO Lim Tze Chien was stationed on the ground floor, at the rear of Blk 14, in order to keep the window of the flat under observation.

There was no response to repeated knocking on the door. One of the officers peered under it and saw that the flat was occupied. The officers continued knocking, but without result. SNO Jamaludin and one of his officers went to the Radin Mas police post, situated close by, to secure a crowbar, leaving ANOs Riduan bin Mohamed Noor and Lim Tian Siew at the door of the flat.

ANO Riduan climbed onto a stool which he found in the corridor, and broke a plywood panel above the door of the flat. He looked in and saw Kadir bin Awang squatting on the floor, at the end of a bed. ANO Riduan ordered the accused to open the door, which he duly did. ANOs Riduan and Lim Tian Siew entered the one-room, L-shaped flat and saw that it held two other occupants, Jamala and Yusoff. The accused and Yusoff were searched, and nothing in the way of drugs or weapons was found on them.

SNO Jamaludin and NO Ho Thiam Huat, the officer who accompanied him to the police post, returned to the flat shortly afterwards. SNO Jamaludin ordered ANOs Riduan and Ho to conduct a search. ANO Riduan found a quantity of vegetable matter and a rolled-up $1 note on the floor, near a bed. The vegetable matter was later ascertained to be cannabis, and the dollar note was found to be stained with diamorphine.

One of the pieces of furniture in the flat was a white cupboard, with a pair of drawers at its foot. ANO Riduan found a set of keys in the cupboard. He asked who owned them, and the accused acknowledged that the keys were his. ANO Riduan then asked to whom the cupboard belonged, and the accused said that it belonged to him. ANO Riduan opened one of the drawers at the foot of the cupboard with a key and found in it a plastic bag and a cigarette carton. The bag contained 20 sachets, and the carton 13 smaller sachets, of a granular substance which, upon later analysis, was found to contain a total of 50.61 gm of diamorphine.

After the discovery of the drugs and the money in the drawer, the accused, who had been seen squatting, handcuffed to Yusoff, told SNO Jamaludin that he had something to say. The SNO ordered the handcuff to be unsecured and, as he and the accused walked towards the

kitchen area of the flat, the accused made a statement ('the oral statement') to SNO Jamaludin.

As this evidence emerged, counsel for the accused rose and said that he had no notice of the oral statement and that SNO Jamaludin had made no reference to it in his evidence before the preliminary inquiry. If the accused had made a statement, and if it allegedly amounted to a confession, said counsel, he was objecting to it on the grounds that it was not voluntarily made. The learned DPP responded that the oral statement did not amount to a confession 'in regard to this case'. We nevertheless ruled that we would deal with the admissibility of the oral statement in a voire dire in which we would also rule on the admissibility of a statement ('the written statement') allegedly made later by the accused pursuant to s 122(6) of the Criminal Procedure Code (Cap 68, 1985 Ed).

During the search of the flat, Jamala's passport was recovered. It showed that she had entered Malaysia via Johore Bahru on 1 October 1986, and that she had returned to Singapore on 9 October.

At about 6.15 pm, the accused, Jamala and Yusoff were escorted to CNB. They arrived there at about 6.30 pm and remained in the general office until about 8.40 pm when they were both taken to the Singapore General Hospital for medical examinations. The accused was brought back to CNB from his medical examination at about 10.15 pm, and at about 10.35 pm he was charged, jointly with Jamala in furtherance of the common intention of them both, with having imported 33 packets of diamorphine at about 5.45 am that morning at Keppel Road Railway Station without authorization, and in contravention of s 5 of the Misuse of Drugs Act, read with s 34 of the Penal Code.

Little more than six weeks later, namely, on 1 December 1986, Jamala was produced in court. The charge against her was withdrawn, and she was discharged, her discharge amounting to an acquittal. Shortly after her acquittal she was served with a subpoena to give evidence on behalf of the prosecution at the preliminary inquiry, which was held on 8 July 1987. She duly did so.

She also gave evidence against the accused at the trial before us. Her evidence was crucial to the case for the prosecution.

Jamala said, in her examination-in-chief, that she first met the accused in June 1986, and that her relationship with him became close. She was on drugs and obtained her supply from the accused. On 1 October 1986, she went to Penang with the accused on holiday at his invitation. They lived in a hotel, she thought, for about three days, and on one of those days the accused told her that he was going downstairs to see a friend. Thereupon, Jamala went to the window of her room, which was adjacent to the accused's room on the fourth floor of the hotel, from which she could see the hotel carpark below, and beyond it, the street on which the hotel was located.

She saw the accused in the carpark. He took out 'a stack of money', two inches thick, and handed it to his friend, who had driven up in a car, in exchange for a plastic bag. The accused then came up to her room, gave her a 'straw' and told her that they would be going to Kuala Lumpur, which they duly did.

In Kuala Lumpur, the accused and Jamala shared the same hotel room. They stayed for about two days, went to Malacca for half a day and then proceeded to Johore Bahru where they checked into a hotel and stayed for about three days in the same room.

On the second of those three days, the accused opened the plastic bag which she had seen him receive in the carpark in Penang. He took from it a parcel wrapped in newspaper, which contained packets of what looked like the drugs she was in the habit of consuming, and which the accused called 'smack'. They both consumed some 'smack', after which the accused told Jamala that they would be returning to Singapore the following day. The accused instructed Jamala to repack the drugs. In the course of doing so she counted 33 packets. The accused and Jamala quarrelled because she was afraid and was reluctant to return to Singapore with him. The quarrel continued for some time, during the course of which the accused struck Jamala across the back with a coat-hanger.

In the event, at about 5 am the next morning, 9 October 1986, the accused and Jamala proceeded to the railway station in Johore Bahru, Jamala carrying the packages containing the drugs in her suitcase, at the accused's insistence. Upon the arrival of the Singapore train at about 5.30 am, they boarded it after a customs' check, Jamala sitting three rows behind the accused, each occupying a window seat on the right-hand side of an empty carriage.

Following the train's departure from Johore Bahru, the accused went to Jamala's seat and asked for the package. She got it out of her suitcase and gave it to him. He then asked her for a plastic bag and she gave him one into which she had packed her shoes. The accused returned to the seat he had been occupying previously, and Jamala saw him place the package in the plastic bag. As the train alongside the Ayer Rajah Expressway approached an overhead bridge at Lower Delta Road, the accused rose, leant out of the window, signalled to someone outside by pointing with his hand and threw the plastic bag, with the package in it, out of the window just as the train passed the overhead bridge. Jamala saw a person standing 'near the overhead bridge' to whom the

accused had addressed his signal. She saw that it was Yusoff. She also saw Yusoff respond to the accused's signal by pointing to the spot at which the accused had pointed just before the package was thrown.

The train proceeded to the railway station at Tanjong Pagar. The accused and Jamala alighted and proceeded to the flat by taxi. Yusoff was already there. The accused asked Yusoff whether he had retrieved the package, to which Yusoff replied in the affirmative. At noon the accused gave Jamala the key to the flat and the key to the cupboard, saying that he was going out. Jamala went to sleep and was awakened by the CNB officers knocking at the door. They took possession of Jamala's passport, but not that of the accused, which they left on the bed. She had seen the accused's passport on their journey to Penang. It bore the accused's photograph, but a name which was not his.

Before the conclusion of Jamala's evidence-in-chief, counsel for the defence applied for an adjournment in order to take instructions on the grounds that Jamala had given a mass of evidence, in particular concerning events which occurred in Malaysia, which had not featured in the story she told at the preliminary inquiry. Counsel's application was wholly justified and we readily granted an adjournment of a day's duration.

When the trial resumed, Jamala continued her evidence. She told us that after her discharge on 1 December 1986, the accused's father offered her $10,000 'not to go to court'; that at or about the same time, she was assaulted by three young Chinese who called out her name, asked her if she knew the accused, and beat her up; and, that a week before the trial commenced, she was accosted at Telok Blangah Market by the accused's younger brother, Jamil, and told that if she gave evidence 'and anything happened' to the accused, she would suffer the same fate.

The voire dire

Counsel objected to the admissibility of the alleged oral and written statements on grounds which boiled down to the following:

(i) that the accused made no oral statement;
(ii) alternatively, if he did make an oral statement, it was not made voluntarily in that the accused was assaulted by SNO Jamaludin and ANO Lim Tze Chien, shortly after the SNO entered the flat upon his return from Radin Mas;
(iii) the accused made no written statement, SNO Jamaludin having been the author of a written statement signed by the accused;
(iv) alternatively, if the accused did make a written statement:
  (a) it was not recorded in compliance with the provisions of s 122(6); and
  (b) immediately prior to the recording of the written statement, inducements and promises were offered to the accused while he was seated at SNO Jamaludin's table; and
(v) that even if there was no threat, promise or inducement leading to the recording of the written statement, the accused's state of mind, as a result of the consumption of drugs, was such that we should exercise our discretion against the admission of the statement.

As to the alleged assaults, the accused's evidence was that when SNO Jamaludin entered the flat at about 5 pm on 9 October, he was angry. That, we find, is perfectly possible. The occupants of the flat had refused the CNB officers entry for some time and SNO Jamaludin had been obliged to go and obtain a crowbar at Radin Mas police post. When he returned he found that two of his officers had already been let in. It is therefore conceivable that he was not in a particularly agreeable frame of mind. However, we did not believe that virtually his first action upon entering the flat was to strike the accused two or three blows in the stomach. As for the slaps and push alleged to have been delivered by ANO Lim Tze Chien, we found that he was the officer who was posted to the rear of the building, on the ground floor and that when SNO Jamaludin entered the flat, ANO Lim was still at that post and could not have assaulted the accused.

We are bound to state that although ANO Lim Tze Chien was present in court, as were SNO Jamaludin's other officers, neither ANO Lim Tze Chien (who was identified by the accused as the officer who slapped and pushed him) nor those other officers were called as witnesses in the voire dire to rebut the accused's allegations. This was an imprudent decision on the part of the learned DPP, and in so saying we have in mind the judgments of the Federal Court in *Tan Too Kia* v *PP*,[1] and that of Choor Singh J in *PP* v *Ibrahim bin Mastari*,[2] reported in the same volume at p 188. However, these cases do not say that the failure to call a witness in rebuttal at a voire dire is fatal to the admission of a statement. In our view, such an omission simply imposes upon the court a duty to scrutinize the evidence as to voluntariness with very special care. This we did. We also bore in mind the evidence of Jamala, who gave her evidence before the voire dire. She said that she did not see SNO Jamaludin assault the accused upon entering the flat, and we believed her.

After the accused, Jamala and Yusoff were escorted to CNB from the flat, they remained in the general office for some two hours before being taken to the Singapore General Hospital for their respective medical examinations. There was no criticism of the treatment the accused received during this period, and he conceded that he was not threatened in any way, nor was he the recipient of any promise or inducement.

Dr John Richard Isaac, who carried out examinations of the accused both before and after the written statement was made, was not called as a witness in the voire dire, but gave evidence earlier. He did not bring his clinical notes to court, but Dr Isaac said that he found no sign of injury on the accused, and that the accused did not complain of any assault. Although Dr Isaac conceded that he would only have observed bruises if the accused was struck heavy blows, we were satisfied from our observation of the accused and our assessment of him when he gave evidence in the voire dire, that he would have said so to Dr Isaac in the plainest of terms had he been assaulted earlier in the day.

In the result, our unreserved conclusion was that the accused's account of the alleged assaults in the flat at the hands of SNO Jamaludin and ANO Lim Tze Chien was untrue. We found that the accused was not assaulted and therefore had no reason to fear further assault.

It was asserted by the accused that in the twenty minutes or so between the time he was brought back from his medical examination and the time he began making his written statement, he was seated at SNO Jamaludin's desk and that he received certain inducements and promises, as well as being taunted by having a sachet of diamorphine dangled in front of him. SNO Jamaludin's evidence was that at that time he was engaged in sorting out and marking the exhibits in the case and that he offered no blandishments of any kind to the accused. We believed the SNO's version of what took place and rejected the accused's account of what transpired during the period in question.

In so far as it was alleged that the written statement was not recorded in compliance with s 122(6) of the Criminal Procedure Code (Cap 68, 1985 Ed), a careful assessment of the evidence drove us to the conclusion that the prosecution had proved beyond reasonable doubt that the requirements of the section were complied with. We were satisfied that both the charge and the warning were interpreted and explained to the accused, and we were particularly impressed with the evidence of the interpreter, Abdul Razak, in these respects. The accused's evidence was that SNO Jamaludin was the author of the statement; that none of it fell from the lips of the accused; that he had signed the paper (P14) bearing the handwritten charge, the warning, and the acknowledgements four times in one fell swoop, at the behest of SNO Jamaludin because he was fed up and wished to be taken down to the lock-up. We regarded this account as outlandish, and we disbelieved it, preferring the evidence of SNO Jamaludin and Abdul Razak.

As for the submission that we should exercise our discretion and keep the written statement out on the grounds that the accused was not in a fit state to make it due to the effects of drug consumption, Dr Isaac said that the accused had seemed well and alert. He did not observe withdrawal symptoms, and when asked if he had any complaints, the accused had answered in the negative. If the accused had exhibited withdrawal symptoms, said Dr Isaac, he would have seen them and recorded the fact in his report.

The accused's objections to the admissibility of the oral and written statements failed. We concluded that the accused had made both the oral and written statements, and that he had made them voluntarily. We ruled that both statements be admitted into evidence.

The resumed trial

SNO Jamaludin gave evidence that the oral statement, made to him by the accused in the flat just after 6 pm on 9 October 1986, was in the following terms:

> 'Lia' (Jamala) has got nothing to do with the case. I was the one who brought the thing in from Penang. Let her go because she just accompanied me.

The written statement, which was recorded some four and a half hours later went as follows :

> On 1 October 1986, I left for Penang with Jamala. After two days there, I bought 20 sachets of heroin and 13 mini-sachets of heroin for Malaysian dollars $5,400. I returned to Singapore by train this morning at about 5.45 am. I went home with Jamala and kept the heroin in my cupboard drawer. Later in the evening, CNB officers raided my home and arrested me together with the drugs. All the drugs were meant for my consumption. I plead for leniency.

Notwithstanding the admission of the statements in evidence, counsel for the accused requested that Dr Isaac be recalled, since counsel wished to address the issue of the probative value of the statements. Dr Isaac was duly produced for cross-examination by counsel. This time he brought copies of his clinical notes with him. At the time he examined the accused, Dr Isaac had been qualified for four years, and had been attached at various times to Singapore General Hospital, Tan Tock Seng Hospital and National University Hospital. He had performed duties as a medical officer with general medical, as opposed to specialist, training.

Dr Isaac thought that the pre-statement examination of the accused would have taken him about ten minutes. There was no request on the part of CNB for the accused to be examined for the effect of drugs, although the form which had accompanied the accused stated that he had been involved in a trafficking offence. Dr Isaac said that in the case of a habitual heavy user, he would expect withdrawal symptoms to begin to appear between five and ten hours after consumption, and that the symptoms would be at their worst between 24 and 48 hours after consumption. Dr Isaac detected no withdrawal symptoms, but he conceded that he might have looked more carefully if he had noticed that the accused was an abuser. He did not look for these symptoms as a matter of

routine, but such symptoms are very overt. He would have observed them if they were present, and he would have noted them down.

Dr Isaac said that withdrawal symptoms include anxiety, hostility, disorientation, sweatiness, abdominal pains, muscle aches, vomiting and nausea. He was honest enough to say that he could not state what symptoms would be exhibited at the onset of withdrawal, that is to say during the period between five and ten hours after consumption, because of his lack of experience of this type of problem, and because symptoms during onset are more subtle. Although the accused appeared alert and his general condition was good, Dr Isaac conceded that a patient who has taken drugs can appear perfectly lucid. The accused's nasal passages had appeared to be 'a bit wet'. Dr Isaac agreed that a running nose is one of the symptoms of withdrawal.

In answer to a question from the court, Dr Isaac expressed the view that having regard to his observation of the accused during the pre-statement examination, a statement made by the accused immediately thereafter would have been reliable, in the sense that it was not likely to have been affected by the consumption of drugs.

Some six or seven days into the trial, we were told by the learned DPP that Yusoff (who, on the case for the prosecution, had recovered the package containing the drugs and taken it back to the flat) would not be called as a prosecution witness because he had declined to give evidence. This came as no surprise since Yusoff had not been a witness at the preliminary inquiry. The DPP informed us that Yusoff, although not in court, would be offered as a witness to the defence. We directed that Yusoff be traced and brought to court, so that he might be interviewed by counsel for the defence.

Two days later, we were told that Yusoff had been seen by SNO Jamaludin the previous day, and that he had 'promised' to turn up in court but had failed to do so. No attempt had been made to serve him with a subpoena. The DPP was directed to effect service of a subpoena on Yusoff to the intent that he be produced in court on 30 January so that counsel for the defence might interview him.

At the close of the case for the prosecution, counsel submitted that the accused should not be called upon to make his defence. He submitted that, on the prosecution's own case, it was Jamala who had imported the drugs into Singapore, not the accused; her evidence was incredible and was radically different from the evidence she had given at the preliminary inquiry; the prosecution had neither called nor made available the witness Yusoff, a vital link in the prosecution case; and the prosecution had in any event failed to prove that the drugs found in the flat were the drugs that Jamala had imported.

We rejected counsel's submission. There was evidence, which was not inherently incredible, and which if accurate, established that Jamala had carried the drugs onto the train at Johore Bahru as the accused's agent and/or under duress applied by him; that once the train was in Singapore the drugs were taken by the accused from Jamala, and thrown out of the train at Lower Delta; and that those drugs were retrieved by Yusoff and taken to the flat, where they were seized by the CNB officers. We were of the view that the *Haw Tua Tau*[3] test was satisfied, and called upon the accused to make his defence to the charge.

The accused, who is 42, gave evidence on his own behalf. He told us that he began taking drugs in 1977, and was arrested for the first time in 1978. He was confined at DRC for three periods, the last of which ended in May or June 1985, at which time he was placed on the 'day release scheme'. This scheme enabled him to work outside the Centre but required him to return at night.

He absconded soon after he was placed on the scheme, after which he had no fixed address. He did not return to the flat in which his wife and two unmarried children lived; nor did he return to his mother's apartment, opposite the flat, because his mother had told him that CNB officers were looking for him. Between the time he absconded in June/July 1985 and the date of his arrest, 9 October 1986, he took casual jobs as a labourer, slept rough, earned between $200 and $300 a week, and spent the greater part of it on heroin, ganja, a drug called 'Heromin 5' (which he used to reduce withdrawal symptoms), and beer.

On 8 October 1986, the accused had received $300 as wages for working as a stevedore for four or five days on board a Japanese vessel, which was moored at the Quarantine Anchorage. He had been employed by a Chinese contractor, whose name he could not remember. He did not know the name of the vessel. He had eaten and slept on board, having been taken to the vessel by bumboat from Clifford Pier. His work on board ended on 8 October.

The accused remembered waking up at about 7 am on the morning of 9 October 1986. He found himself at the Esplanade. He had consumed 'smack' and ganja the previous night, after returning ashore from his job on the ship, and had also drunk beer, becoming very 'high'. He described himself, in English, as having been in a state of 'havoc'. He could not recall how he had got to the Esplanade, but having awoken at 7 am he washed his face at a public toilet, and had a cup of coffee at a stall in the Satay Club. He then took a bus to a construction site at Palmer Road, with a view to finding work.

There was no work available. He went to a canteen at the worksite, and fell in with a group of Thai, Malaysian and Bangladeshi labourers who were gambling at cards. The accused told us that he is a lucky gambler, and with the $100 or so that was left after his binge the previous night, he bought a couple of sticks of ganja, and won over $1,000, gambling between 9 am and 2 pm. He decided to go to his mother's apartment at Telok Blangah Crescent in order to give her some money.

When he got there, the door to his mother's apartment was ajar, and he could see relatives from Segamat inside. He turned on his heels, walked a few steps across the corridor to the flat and knocked on the door. It was opened by Yusoff, who let him in.

Upon entering the flat, he saw Jamala. This was only the second time that he had laid eyes on her, the first having been in or about June/July 1986. The accused sat on the floor with Yusoff and Jamala, and they took heroin together, using a rolled up $1 note to 'chase the dragon'. Later, there was knocking at the door. The accused let in two CNB officers after the panel above the door had been broken. Later SNO Jamaludin had entered, armed with a crowbar. He approached the accused, who was squatting, hauled him up by his right arm and struck him two or three blows in the stomach, saying, 'Why did you not open the door earlier?' At the same time, SNO Lim Tze Chien slapped him across the back a couple of times and pushed him.

The CNB officers searched the flat. They seized the diamorphine from the drawer, and the rolled up $1 note and some ganja off the floor. Before ANO Riduan searched the cupboard, he did not ask who owned the keys he found, or whose cupboard it was. The accused made no oral statement to SNO Jamaludin and he was not asked for his passport. He did not have an identity card, let alone a passport.

Jamala, Yusoff and the accused were escorted out of the flat, in that order. In the corridor, the accused shouted for his mother three or four times, and when she appeared he tossed his wallet containing his morning's winnings to her, since after all he had come to visit her in the first place in order to give her money. The wallet landed on the floor. As the accused's mother was about to pick it up, SNO Jamaludin pushed her aside, and retrieved it with his left hand. When the accused's mother tried to take it from him, he took it from his left hand into his right hand, and held it out of her reach, pushing her away. SNO Jamaludin, his escorts and their prisoners then went on their way to CNB.

As for his relationship with Yusoff, the accused said that they had first met as inmates of DRC in 1981. There had been two casual meetings in 1983. In March 1986, the accused had gone to visit his mother and saw Yusoff, dressed in a sarong, outside the flat. They had exchanged greetings, and ended up consuming 'smack' in the flat, Yusoff having let the accused in.

In a nutshell, the accused had not gone to Penang with Jamala on 1 October 1986 and therefore had not returned with her on 9 October. Jamala's evidence was a total fabrication. The drugs in the flat did not belong to him; nor did the other items, such as a camera and video tapes, that were found in the same drawer as the diamorphine.

The accused called no witnesses. Counsel for the defence was eventually able to interview Yusoff, and decided not to use him.

The accused's defence was, essentially, alibi. Despite this, no notice was given on his behalf in accordance with the provisions of s 155 of the Penal Code. However, the DPP took no issue over the absence of the prescribed notice, and we allowed the accused to give evidence in support of his alibi. At the end of the defence case we allowed the DPP to call two witnesses by way of rebuttal of the alibi evidence. Cpt Chua Eng Kiat (PW13) told us that he knew of no instance in his eight years as OC Enforcement, at the Port Master's Department, of a vessel having worked cargo for up to four or five days in any of the port's three Immigration and Quarantine Anchorages. A vessel may be worked in these anchorages only if specific permission is granted, and permission is generally granted for a few hours, and then only in exceptional circumstances. The Immigration and Quarantine Anchorages are separated from working anchorages by buoys.

Abdul Rahim bin Mohamed Don (PW14), an assistant public health inspector, said that he has been responsible for public health in the Satay Club area in Empress Place since November 1987. At any rate, during the period since he assumed this responsibility, stalls have opened at 3 pm and have stayed open until midnight. No stalls have opened for business as early as 7 am.

Following the conclusion of the closing submissions, we considered the evidence. There were certain features of the prosecution case, which we noted, and of which we took careful account. They were:

(i) despite the fact that Jamala's passport was recovered from the flat, and that at or about the same time the accused told SNO Jamaludin that he had brought the drugs into Singapore from Malaysia that morning, the accused was not asked for the passport he had used, no passport was recovered, and there was no evidence that the accused had disposed of a passport following his return to Singapore. Jamala said that she saw the accused's passport lying on a bed in the flat after she and the

accused had returned, but no member of the raiding party saw it; SNO Jamaludin made no inquiries as to whether a passport had ever been issued to the accused or, if one was issued, whether it had ever been confiscated on any one of the three occasions when the accused was sent to the DRC;

(ii) SNO Jamaludin returned to the flat after escorting the accused, Jamala and Yusoff to CNB. He did so to supervise the taking of photographs and, according to him, to search for the accused's passport. He had said nothing about a search for the passport at the preliminary inquiry, and ANO Lim Thian Siew, who accompanied him on this visit to the flat, said that there was no search;

(iii) Jamala could not remember the name of any one of the four hotels she and the accused had checked into in Malaysia, despite the fact that they had stayed in Penang for (as it emerged) at least four days, and in Johore for three;

(iv) although they had gone to Penang for a holiday, Jamala spent the best part of her time there in her hotel room, or that of the accused;

(v) Jamala said that the accused chose to take possession of, and pay for, the drugs in the carpark of the hotel in Penang in broad daylight, in public view, without even bothering to get into the car in which the accused's friend had driven up;

(vi) Jamala was for some reason drawn to the hotel window on the fourth floor at which she remained for some 25 minutes, and from which she was able to observe the two-inch thick stack of notes which the accused passed to his friend in exchange for the bag containing the drugs;

(vii) despite the fact of having visited Johore Bahru between 40 and 50 occasions in the 15 or so months before October 1986, Jamala was not only unable to name the hotel in that town in which she and the accused stayed, but was also unable to state its location;

(viii) Jamala was unable to give any explanation, or at any rate any explanation that convinced us, for her numerous previous visits to Johore Bahru, bearing in mind that she neither worked nor lived there;

(ix) since Jamala could not have expected the accused to throw the package out of the train window, and bearing in mind the speed at which the train was travelling, the darkness of the hour and the nature of the lighting on the overhead bridge, Jamala was able to observe with great clarity not only the accused's actions, but Yusoff standing in the vicinity of the overhead bridge and responding to the accused's gestures;

(x) although Jamala had been afraid of returning to Singapore with the accused when she realized that he had purchased drugs in Penang, and sought to distance herself from him on the train, she readily returned to the flat with him, making no effort to go back to her parents' home close by; and

(xi) no suitcase was found in the flat; and no evidence was led as to who, if anyone, paid rent for the flat after its registered occupant died in 1984;

(xii) although, on the prosecution case, Yusoff was prima facie an abettor of the offence with which the accused was charged, SNO Jamaludin chose not to charge him and sent him to DRC on the day following his arrest;

(xiii) a DPP decided to withdraw the charge against Jamala. He gave no reason to SNO Jamaludin for his decision to do so, and following her acquittal she gave evidence for the prosecution at the preliminary inquiry and at the trial;

(xiv) Jamala's allegations that the accused's father attempted to bribe her; that she was assaulted by the young Chinese men; and that she was threatened by the accused's younger brother were never investigated; and

(xv) SNO Jamaludin did not carry out any investigations in Malaysia with a view to ascertaining whether the accused had been in that country between 1 October and 9 October 1986.

In assessing the accused's credibility, we put out of our minds that he is an acknowledged drug abuser, and has been for a decade or more. There were a number of crucial parts of his evidence which we disbelieved, and rejected. We did not believe that, after absconding from the day release scheme in June/July 1985, the accused did not visit the flat until March 1986, and that he did so on that occasion because he was invited in by Yusoff. Yusoff, according to the accused, was a man he first met at the DRC in 1981. He had seen him on two further occasions in or about 1983. It was incredible that this casual acquaintance should have suddenly turned up at the flat, opposite the apartment of the accused's parents, wearing a sarong and to all the world the occupant of the flat. We also rejected the accused's evidence that, from the time he absconded he slept rough, wherever he could, washing himself at public toilets, and hardly ever changing his clothes, when the flat opposite his parents' had fallen vacant in 1984, its registered occupant having died. Immediately after the accused's arrest, SNO Jamaludin had handed the keys of the flat to the accused's stepfather, with certain other items found in the flat, and the latter had accepted them.

We found as a fact that the accused had access to and made use of the flat, and we accepted the evidence of ANO Riduan that the accused acknowledged to him that he was the owner of the cupboard, and the keys to the drawers. In his effort to dissociate himself from ownership of this piece of furniture and its contents, the

accused denied that the money recovered by SNO Jamaludin was found in the drawer, and asserted that the money was taken from the wallet he threw to his mother in the corridor as he was led away. However, neither the accused's mother, nor any other witness, was called to support the accused's evidence of the alleged incident in the corridor. We also took into account the evidence of Jamala, which we believed, that some time after she and the accused returned to the flat on 9 October, the accused left the flat for a period, leaving the keys to the flat and to the cupboard with her.

We disbelieved the accused's account of the alleged assaults in the flat, and having regard to the medical evidence, we did not accept that the accused's faculties were impaired by the consumption of drugs, to the extent that his oral and written statements could be said to have been of little or no probative value. Dr Isaac acknowledged that he was not an expert in the field of drug abuse, but he was confident that had the accused exhibited any of the symptoms of withdrawal, he would have observed and made a note of them. Although slightly wet nasal passages could be a symptom of the onset of withdrawal, the accused had complained of flu at the post-statement examination, and the doctor had apparently prescribed Panadol. Dr Isaac's opinion was that the accused was not exhibiting withdrawal symptoms. The accused was alert and lucid, and we accepted the doctor's evidence that a statement made by the accused at about the time the examinations were carried out would have been reliable to the extent that it would not have been affected by earlier consumption by the accused of drugs.

Counsel for the accused criticized the failure of the prosecution to call Yusoff. He submitted that this left a serious gap in the prosecution case. It was not enough that Yusoff was offered as a witness to the defence, and an adverse inference should be drawn from the fact that Yusoff was not called as a witness for the prosecution, the defence being under no obligation to call him as their witness. Counsel relied on *Abdullah Zawawi* v *PP*.[4] In our view, that case is distinguishable, the prosecution there having failed to call the only witness capable of explaining certain crucial facts. Salleh Abas LP, delivering the judgment of the Federal Court, said :

> The practice of making available a witness or witnesses from whom statements have been taken is to prevent the defence from commenting upon the honesty of the prosecution and thus invoking the often quoted presumption of adverse inference under s 114 (g) of the Evidence Act. But where the prosecution evidence falls short of proving a prima facie case at the end of its case, the right not to call such witness/witnesses and to make him/them available to the defence will be of no avail. If the doubt consists of the gap arising out of the matters adumbrated earlier, the prosecution must close this gap. It is not for the defence to call the offered witness/witnesses to supplement the prosecution case.

The case before us is different. The essential elements of the offence were capable of being, and were, established without the need to call Yusoff. Jamala's evidence was that she packed the 33 sachets, which were not all the same size, and which the accused had purchased in Penang. She carried them onto the train in a plastic bag at his request, and after the train had entered Singapore, the accused threw the package out of the train to the waiting Yusoff. Jamala heard Yusoff confirm in the flat that he had retrieved the package, and later that afternoon 33 sachets, 20 large and 13 smaller, contained in a plastic bag, were recovered from the flat, to which the accused had access, in a drawer to which he held the key. The contents of the sachets contained not less than 50.61 gm of diamorphine. That evidence was not inherently incredible and, if accepted as accurate, established the essential elements of the offence at the end of the prosecution case. Yusoff's evidence was not crucial, and the decision not to call him, and to offer him to the defence, did not amount to a failure on the part of the prosecution to discharge the onus of proof which lay upon it.

We disbelieved the accused's alibi. It was unsupported by any independent evidence, and the accused was wholly unconvincing in his account of it. Furthermore, the alibi had to be balanced against Jamala's evidence. Her cross-examination, and the questioning of her by us, occupied the better part of three days. Jamala was 21 years old at the time of her arrest. She is about 23 now. In our assessment, she is intelligent and shrewd. We regarded her as an accomplice and we considered her evidence with much circumspection. We took into account that a great deal of crucial evidence she gave at the trial did not form part of her evidence at the preliminary inquiry.

We also drew the inference that the charge against Jamala had been dropped so that she would be free to give evidence against the accused, in all likelihood because the CNB had failed to recover the passport used by the accused which, together with his oral and written statements, would have been enough to form the basis of a prosecution.

In the course of giving evidence, Jamala sought to sanitize her character and distance herself from the offence. She fudged her evidence about the hotels at which she stayed in Malaysia between 1 October and 9 October and became amnesiac about the reasons for her numerous visits to that country in the 15 months or so prior to October 1986. We nevertheless found that when Jamala went to Malaysia on 1 October 1986, she was accompanied by the accused, who travelled on a false passport. Putting it at its lowest, we found that Jamala was aware of the purchase by the accused of the drugs in Penang, and witnessed the transaction at much closer quarters than she was prepared to admit. We concluded

that she carried the package containing the drugs onto the train at Johore Bahru by arrangement with the accused, in furtherance of the common intention of them both to import the drugs into Singapore. We believed that she witnessed the package being thrown out of the train by the accused, to the waiting Yusoff, that Yusoff retrieved it and took it to the flat, and that its contents were seized by the CNB officers when they carried out the raid.

We have indicated areas in the prosecution case which gave us pause, lest it be said that we failed to take account of them, but having regard to the evidence as a whole, in particular Jamala's evidence in so far as it bore on the importation of the drugs, the accused's voluntary oral and written statements, and our assessment of the accused's credibility, we were satisfied of the accused's guilt beyond reasonable doubt. We convict him as charged.

Accused convicted.

Solicitors: *Sant Singh & Partners.*

Reported by *Ng Sheau Jiuan*

MALAYSIAN REPORTS

Dato M Muthupalaniappan v Tamil Malar Sdn Bhd & Anor

HIGH COURT (SEREMBAN) – CIVIL SUIT NO 22-220-1988
MUSTAPHA HUSSAIN J
15 FEBRUARY 1989

Civil Procedure – Ex parte injunction – Application to set aside – Libellous articles published by defendants – Plaintiff filed writ of summons and obtained ex parte injunction – Statements complained of and averments that they were not true not stated in supporting affidavit – Whether fatal to application for injunction

Tort – Libel – Plaintiff obtained ex parte injunction against defendants for libellous articles published – Statements complained of and averments that they were not true not stated in supporting affidavit – Whether fatal to application for injunction

The plaintiff was an elected state assemblyman for Rantau constituency and operated a service centre in Rantau where the constituents can go and seek help from the plaintiff. The first defendant was the publisher of a Tamil language newspaper and the second defendant was the editor of that newspaper. The defendants had published in their newspaper that the plaintiff did not go to the service centre for about three months, that the electricity supply had been disconnected and that the service centre had been closed down for good. The article also said that the people of the constituency were disgruntled about the closure. The plaintiff made a press statement denying these allegations and about a week later, the defendants reported that the Rantau service centre was only re-opened after the publication of the closure in their newspapers and that the plaintiff in his press statement had hidden the fact of disconnection of electricity supply. The plaintiff's solicitors demanded from the first defendant the withdrawal of the articles and an open apology in the defendants' newspaper. In response to this, the defendants published an article stating that they regretted the articles had hurt the plaintiff's feelings and that they were based on information they had received. The plaintiff was not satisfied with the explanation published and filed a writ of summons against the defendants. The plaintiff also filed an ex parte summons-in-chambers seeking an injunction against the defendants. The ex parte injunction was granted by the court and the defendants have now applied to set aside the ex parte injunction.

Held, allowing the defendant's application:

In general, an injunction would not be given unless the plaintiff/applicant satisfies the court that the statements complained of are untrue. Furthermore the statements complained of and averments that they are not true should have been stated in the affidavit supporting the application for the injunction. This was not done when the plaintiff applied for the injunction. It is only after receiving the application to lift the injunction with the supporting affidavit of the defendants that the plaintiff replied, annexing exhibits claiming that the statements are not true. The injunction therefore cannot stand.

[*Editorial Note*: The plaintiff has appealed to the Supreme Court vide Civil Appeal No 553 of 1988.]

Case referred to

1 *Quartz Hill Consolidated Gold Mining Co* v *Beall* (1882) 20 Ch D 501 (folld)